No. 2680

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

UNION FISH COMPANY (a corporation),
Appellant,

vs.

JOHN W. ERICKSON,
Appellee.

BRIEF FOR APPELLANT.

H. W. HUTTON,
Proctor for Appellant.

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BRIEF FOR APPELLANT.

In this case John W. Erickson filed a libel in the District Court for the Northern District of California, claiming breach of contract, hiring, *a part of which contract was maritime, and a part of which was non-maritime,* and in paragraph 2 of the libel he alleges:

> "That in the month of May, 1914, at said San Francisco, said respondent and said libelent entered into *an oral* contract or agreement wherein and whereby it was mutually agreed that said libelent was to proceed to Pirate Cove, Alaska, *and after arrival there,* to serve the respondent as master of said schooner 'Martha' for a period of *not less than one* year *and also during said time to assist the*

manager of said respondent's salting station at said Pirate Cove when possible so to do without interfering with libelant's duties as said master of said schooner."

It further alleges that libelent proceeded to Pirate Cove arriving there June 12th; that he entered upon the performance of his duties, *part of which were performed on sea and a part on land,* and was discharged July 18th, etc.

Argument.

Exceptions were filed to the libel, overruled, respondent answered, the case was tried and judgment went for the libelant in the sum of $716.05.

Between the time of the filing of the libel and the trial, Mr. Overton, the gentleman with whom libelant claims he had the conversation of hiring, died suddenly and respondent was without means of contradicting libelant's testimony as to a hiring for a year.

The defenses in the case are:

1st. The court had *no jurisdiction* of the alleged cause of action.

2nd. The language used in the claimed contract of hiring does not show a positive hiring for a year.

3rd. There is no proof that Mr. Overton, the party who it is alleged hired libelant, had any authority to hire libelant for any fixed period.

4th. The alleged contract of hiring was void.

I.

THE DISTRICT COURT HAD NO JURISDICTION OVER THE ACTION.

In this case the contract was part maritime and part non-maritime. Libelant was not a seaman, *he was not a fisherman* going out in a boat *in Alaska to fish; he had nothing to do with fishing;* his duties were to sail the "Martha" when she was to be sailed, the rest of the time he worked on shore, as he claims, as assistant to the superintendent. The services of a superintendent are no more maritime than are those of a ship's agent, or the latter's clerks, stenographer or telephone girl. Let us see what he did.

The first work he did was to take his things ashore which took him the first *three days; then he helped the agent around;* then he shingled a roof; then he packed codfish tongues, and he also cleaned up around the station (pages 64 and 65).

At page 87 libelant testified as to what he was to do.

> "A. And to assist Mr. Hoelke in counting fish and helping in general around the station."

On the same page, he said it was four or five days after he arrived at Pirate Cove before he went out on the "Martha"; that trip took one day, and two or three days after that he started on another trip. He then made a trip of three or four days and stayed on shore two days. Then he made a trip of five days; two days after that he started on another trip

which took him two days, then he stayed on shore one day, and made another trip which took two days.

On pages 87 and 88 libelant testified as to how long he was on shore and how long at sea, for a portion of the time, and the summary of it is, he was at sea *thirteen* days and on shore *fourteen* days, doing (page 88):

> "A. I done what I was asked to, bundling up sacks, and I shingled some roofs and I packed some tongues; one day Mr. Hoelke was away and I counted the fish, otherwise he told me he did not trust me to count fish."

Hoelke, respondent's superintendent, in answer to Interrogatories VII and VIII gives libelant twenty days altogether as master and nine days on shore, the character of the work being (page 45):

> "It was general utility work, such as shingling, tying up empty sacks and sweeping out the different warehouses."
>
> (page 44): "He was to be acting as captain of our small tender, the schooner 'Martha', but when the vessel was not in use he was supposed to make himself generally useful about the station."

It is very clear that a part of libelant's services were to be and were performed on land. *Unless the whole were to be performed on the sea,* the court had no jurisdiction. The law is as follows (The Pennsylvania, 83 C. C. App. 139-142):

> "It is not enough that the contract includes a maritime adventure among its objects, or that it was to be performed at sea. *Unless it*

was purely maritime, it was not one of which a court of admiralty had jurisdiction."

In the language of Justice Clifford, in The Belfast, 7 Wall. 637:

> "Contracts, claims, or services, *purely maritime*, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty court.
>
> "Contracts *of a mixed nature are not cognizable* in these courts and that there is sufficient reason for this is well illustrated by the present case. Here is the ordinary contract between school proprietors and persons, with the further provisions that the school is to be located on shipboard, and in the course of instruction is to include a foreign voyage and studies in nautical and naval matters. Combined with the provision of common law obligation are some that may relate to maritime services. *How can a court of admiralty separate the liabilities and apportion the damages arising from the breach of the maritime part of the contract,"* etc.

How can it be done in this case? The "Golden Gate", tender for the station was there while Erickson was in Alaska, and we suppose that the "Martha" had to run around more than usual to carry a cargo of salted fish to send down. At other times he might have been on shore all the time.

Plummer v. Webb, 4 Mason 380:

> "I cannot say the *whole contract* is here of maritime nature. There is mixed up in it obligations *ex contractu* not necessarily maritime, and so far the contract is of a special nature. *In cases of a mixed nature, it is not a*

> *sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime.*"

That language was quoted and approved by the U. S. Supreme Court in The Steamboat Orleans, 36 U. S. 175. In the case of Grant v. Poillon, 61 U. S. 168, the Supreme Court said, approving Willard v. Dorr, *a master's case:*

> "In the case of Willard v. Dorr, 3 Mason 91 (it should be 161), it was held, '*no suit for services performed by the master,* as a factor, *or in any other character, than that of master, is cognizable in the admiralty, merely because the consideration of the contract is maritime. The whole contract* must in its essence be maritime, or for compensation for maritime services'."

The above quotation from Willard v. Dorr, is from the syllabus. The language in the decision (page 167), is:

> "For any other service performed by him, as agent or factor, *independent of his character as master, he can have no claim here; for such claims are not within the cognizance of admiralty.*"

The decision in Grant v. Poillon further says:

> "An agreement by the master of a vessel to pay wages, may be sued upon in the admiralty; but a stipulation in the same contract to pay a sum of money in case the voyage should be altered or discontinued, can be enforced only at common law (L. Arira v. Manwaring Bee's Rep. 199). The admiralty jurisdiction of the United States, being exclusive, cannot be ex-

tended to cases of law or equity, cognizable by the Circuit and State courts, under the 11th section of the judiciary act (1 Baldwin, 554).

"A contract between two persons, one of whom had chartered a vessel, whereby he was to act as master, and the other as mate of the vessel, and the two were to share equally in the profits of the contemplated voyages, was held not to be within the admiralty jurisdiction (The Crusader, Ware's Rep., 437)."

In the case of The Richard Winslow, 18 C. C. A. 344-346, it is said:

"Unquestionably there was here a contract for carriage by sea, and that contract was maritime in its nature. But there was joined with it a contract with respect to the cargo after the completion of the voyage, that was in no respect maritime in its nature. If as Judge, now Mr. Justice Brown observes in the Pulaski, 33 Fed. 383, the storage were a mere incident to the transportation, the entire contract would be held to be maritime, and within the admiralty jurisdiction. But here the contract for holding the corn in storage *did not concern the navigation*. It could not take effect until after completion of the voyage, and had no relation to further transportation of the cargo by the vessel. *It was to be performed at a time when the vessel was not engaged* in commerce or navigation or in the preparation therefor (cases cited). The reason is that such service does not pertain to the navigation of a ship, nor assist a vessel in the discharge of a maritime obligation."

In this case the "Martha" was not even a fishing vessel; she was used in the codfish business. In that business men, of which the libelant was not one, went out in boats and caught fish with lines;

the fish then taken on shore split and salted; when sufficient were on hand, and the "Golden Gate" was there to carry them to San Francisco, the "Martha" went to different stations, collected some of the fish and carried them to where the "Golden Gate" was. That service was unquestionably maritime, but the work on shore was not incidental to that work. "It was to be performed at a time when the vessel was not engaged in commerce or navigation or in preparation therefor" as appears in the above quotation, and again such work did not pertain to the navigation of the vessel, or assist her, the "Martha", in the discharge of a maritime obligation. Nor did it have anything to do with the catching of fish, as it was performed after the fish were caught and cured, just as the storage of the cargo in the Richard Winslow case was done.

In the cases of Domenico v. Alaska Packers Association, and in the case of Larsen v. North Alaska Salmon Company, the agreement was in substance as follows:

> "Work and labor in the capacity of
> SEAMEN, FISHERMEN, BEACHMEN, TRAPMEN.
> Also to work on boats, lighters, steamers and in salteries, canneries and/or in another capacity, up and down at and about NUSHAGAK or elsewhere in Bristol Bay District, Alaska, as directed by the superintendent, during the salmon fishing season of 19....."

That whole contract was a salmon fishing contract. Under it the men had, if required, to go out in the boats and catch fish, also catch them in traps, work on boats, lighters and steamers. The whole contract

was maritime. The contract was also general. Some of the men signing as fishermen, beachmen and cannery men being designated as such, signing the same contract, and it was fishermen that were involved in both cases. In the Larsen case, Larsen was hurt while throwing salmon from a barge, the barge was on the water, and of course it was an admiralty tort.

There is certainly a distinction between the case of where a man has to work in a boat, catch fish, either in a trap or boat, work on a steamer, boat or lighter, *as directed by the superintendent.* The superintendent's duties were not maritime, *and the case of a man who assisted the superintendent would not be maritime. The latter's service not being maritime,* the managing owner of a vessel does not perform maritime services. He may appoint a master of a vessel, or engage seamen, the master and seamen go on board, and while there perform maritime services just as salmon fishers do; but supposing a man assists the managing owner in doing that work, sweeps out warehouses, ties up salt sacks, shingles roofs, and does general utility work, all on shore, he is certainly not performing maritime services any more than the clerks and stenographers of a managing owner does.

In the case of Krohn v. The Julia, 37 Fed. 369, a master of a vessel agreed to carry charcoal to a place designated by the owner of the charcoal, sell it and account for the proceeds. There was a contract of affreightment blended with a contract of

sale, and the court, Judge Pardee, held that the whole matter was non-maritime on account of its mixed nature. See also:

Turner v. Beachem, Fed. Cases, No. 14,252;
Richard v. Hogarth, 94 Fed. 685.

II.

THE LANGUAGE USED DOES NOT SHOW A HIRING FOR A YEAR.

Libelant gives three different versions of the hiring. The substance may in general be about the same, but we do not admit that it is. It is found first on page 25:

> "I would like to have you go up there for at least a year, or longer if everything is all right, and when you get through with the job, of course, we will bring you back."
>
> (Page 86). "Of course, we wouldn't send up anybody for less than a year under no circumstances, * * * and I said, *'if I can get along,* I don't want to come down in a year'."
>
> (Page 97). "'I would like to have you go up there for at least a year or longer *if everything is all right,* and when you get through with the job of course we will bring you back' was that correct as far as you went? A. Yes, sir.
>
> Q. And Mr. Overton did say that, then?
>
> A. Yes, sir.
>
> Q. I would like to have you go up there for at least a year or longer *if everything is all right?*
>
> A. For at least a year."

After testifying to the qualifying clause three times, the witness then left it out.

That language, however, was not a positive hiring for a year; it was always conditional *that libelant was satisfactory.* The language *"if everything is all right"* qualifies everything that it was used in connection with.

Libelant was not satisfactory to respondent, as it appears. Answer to Interrogatory X, page 45, shows libelant would not run to at proper hours.

Answer to Interrogatories XI and XII are to the same effect (same page).

Answer to Interrogatory XIV, page 46, reads:

> "A. The only orders he did not obey was in the matter of getting to work on time. I asked him several times why he did not, and the only answer I got was that he did not come to Pirate Cove to work and would only do so when he was ready."

The answer to Interrogatory XV shows he was discharged for that reason. The answer to Interrogatory XV, page 50, shows he refused to assist in loading and unloading the "Martha", telling Mr. Hoelke, the superintendent, *that he would not do it for him or any other man* (same page).

He was told to clean out a warehouse and tie up some sacks and did not do it.

It also appears that he always insisted on having his wife with him whenever he was working whether on the roof of a house or anywhere else.

It is very clear that libelant was not satisfactory to the respondent, and the job not satisfactory to

him. He testified *he had to stand around like a dummy* (page 104).

Testimony of Updall (page 54):

> "I should say that libelant was very indifferent as to how he performed his work, from the fact that he once told me that he was not satisfied with the way things were at Pirate Cove, also that he would not work on holidays or before 7 A. M. or after 5 P. M."

Wallstedt testified (page 67) that he heard Erickson tell Hoelke that he was dissatisfied with the place and wanted to come down (page 67). When libelant left Alaska he procured a statement. It is found on page 119 of transcript. He went to the office of the respondent with it, *was satisfied that was all he was entitled to,* and asked for $50.00 extra (page 92).

We submit the statement, and its *payment was a settlement in full,* and that there was not any absolute hiring for a year; but the same was on the condition that libelant should prove satisfactory.

III.

THERE IS NO PROOF OF AUTHORITY ON THE PART OF MR. OVERTON TO HIRE LIBELANT FOR A YEAR.

There is no proof who Mr. Overton was. Libelant testified he was the "managing owner of the Union Fish Company". A motion was made to strike that out (page 83), and it should have been stricken out. The burden was on libelant to show authority

for the hiring and that someone in authority had such authority. The mere statement of a person, not an officer of a corporation, that a man, naming him, is the managing owner, is no proof at all.

If Mr. Overton was the general manager of respondent he would *not have authority to hire a master for a year.*

A general manager may hire a person, but not for a fixed time.

If Mr. Overton was general manager of the corporation, his term was one year; he could not hire a person whose term would run over into that of another managing owner, in the event that one was selected. The decisions on this question, as far as we have been able to find them, are as follows:

In the case of Smith v. Co-operative, etc., 12 Daly 304, the hiring was for one year, and it was held that in the absence of express authority from the board of directors, the general manager had no right to hire for any mixed period.

In the case of Reupke v. Stuhr, 126 Iowa 632, the hiring was for one year, and the same decision was rendered. The same rule was laid down in

Camancho v. Hamilton, 2 N. Y. App. Div. 368-9;

Red Cross Protective Association v. Wayle, 171 Fed. 643.

The case of Jenkins S. S. Co. v. Preston, 108 C. C. A. 473, is a case where a master was hired for two years by a contract in writing. A great

quantity of evidence seems to have been introduced to show that the managing owner had authority to make the contract. *In this case there was none.*

It appears in that case that the hiring was made in May, the discharge took place the following January. The general manager testified that he was the whole concern; he was a large stockholder, the board of directors never met, and the court found that it must be assumed that the directors knew of the contract and had ratified it by acquiescence.

This alleged contract is alleged to have been made in May, broken in Alaska at a place where there is but one mail each month, and broken in July, and sued on in August.

IV.

THE ALLEGED CONTRACT OF HIRING WAS VOID.

About two hundred and fifty years ago, the law-making powers of England, to prevent frauds which were constantly occurring, owing to, in some cases, the death of witnesses, in others by their removal and absence, lack of memory and change of conditions, passed what is known as the Statute of Frauds. The legislatures of about every state in the Union have enacted the same statute. California and Alaska, where this alleged contract was to be performed, has.

Sec. 1624 of the Civil Code of California, reads:

> "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent.
>
> "1. An agreement that by its terms is not to be performed within a year from the making thereof."

Sec. 1044 of the Alaska codes is identical.

It is alleged that the contract was oral, was made May, 1914, and the services were to commence when libelant arrived in Alaska; and that he was to work *for not less* than a year thereafter; that he arrived June 12th; so this contract is clearly within the above language.

The lower court held that an admiralty court will not be bound by Statutes of Fraud, etc. In this the court was in error.

This alleged contract was made in the office of appellant on Clay Street, in San Francisco. Libelant undertook to assert a claimed right under certain language. Respondent *had just as much right to claim that the language gave no rights to libelant as the latter had to claim rights under it.* The contract was absolutely void when made. *A contract void where made is void everywhere.* No authorities are necessary on that point.

Now libelant could not have enforced the contract in the courts of the state where made or in Alaska, so when and at what time did it get its validity? If it was void in one court, it would be void in all

courts. And how can it happen that because libelant selected an admiralty court to try his case, *that respondent lost its otherwise perfect defense?*

In so far as this defense is concerned, it is not a *matter of jurisdiction;* it is solely a question *of the rights* of the respective parties, and rights given by a state statute are always recognized in an admiralty court. The decisions are uniform on that point. We cite the following. In 13 Wallace 236, the court said, on page 243:

> "It is urged further that a State law could not give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any federal court; but that is not aquation in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal whether it be a court of equity, or admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked *to give effect to the right* by applying the appropriate remedy. *This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal."*

We ask, at this stage: Does a defendant forfeit his rights because he, in a civil suit, is forced tc defend in a federal court?

> "Jurisdiction having attached, *his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality.* In no class of cases has the application of this principle

> been sustained by this court more frequently than in those *of admiralty and maritime jurisdiction.*"

The language

> "and its determination is governed by the same considerations as if it had been brought in the proper State tribunal of the same locality",

means that the libelant has the same cause of action, and the respondent has precisely the same defenses. *It does not mean that a defense is lost because the party who sues happens to select one court in preference to another.* It certainly does not mean that an admiralty court will enforce a right given by a state statute *and not protect one.*

A defense that is good in one court, *if no international or international commercial law questions* are involved, is good in all courts.

A contract is to be interpreted according to the law of the place where it is to be performed, provided it is not void where made. This contract was to be performed partly on land in Alaska, and partly on the inland waters of Alaska, and was void where made and at the place of its performance. It is not like the case in 129 U. S. 443, where the contract was made in New York, to be performed on a British vessel, completed in Great Britain, and the damaged occurred there. That contract was international.

Of course if Congress had legislated upon this matter to the contrary we admit that the defense would not be good, but it has not.

In Thompson v. Phillips, 1 Baldwin 274, it is said:

> "It cannot be doubted that in a suit in a state court, this law would be the rule of decision on the rights of the parties; it is difficult to perceive a reason why a different rule *should be adopted in this court.*"

Orleans v. Phoebus, 11 Peters 184:

> "The local law can never confer jurisdiction on the courts of the United States; *they can only furnish rules to ascertain the rights of parties* and thus assist in the administration of the proper remedies."

Lorman et al. v. Clarke, 2 McLean 563-573:

> "Now can it be said that, in a case like this, the jurisdiction of the court is derived from the local law? As in all other cases which do not arise under the laws of the Union, *the local law governs the contract or right* but the power to act is derived from the laws of the Union."

All of our pilot, insurance, local maritime liens laws at one time, were or are created by state laws. There is scarcely a contract relating to maritime affairs that is not made on land, and if such a contract is void, and there is no federal statute covering the same matter, such contracts are never enforced.

In the case of The Hamilton, 207 U. S. 398, it is said (page 405):

> "We pass to the other branch of the first question: whether the state law, being valid, will be applied in the admiralty. *Being valid, it created an obligation, a personal liability of*

> *the* owner of the Hamilton to the claimants. * * * *This of course admiralty would not disregard, but would respect the right when brought before it in in any legal way.*"

How is it possible that that language does not apply to rights of a person who is sued, as well as one that is suing?

Courts of admiralty and courts of equity are in some respects similar. If the Statute of Frauds is binding on the District Court in an equity case it is also binding upon it in an admiralty case. The following were Statute of Frauds cases:

> Purcell v. Minor, 4 Wallace 513-517.
>
> "The statute which requires such contracts to be in writing, is equally binding on courts of equity as courts of law."
>
> Whitney v. Hay, 191 U. S. 77-84.
>
> "It is obvious that courts of equity are bound, as much as courts of law, by the provisions of this statute; and therefore they are not at liberty to disregard them."
>
> Moses v. Lawrence City Bank, 149 U. S. 303.

Those were cases where it was claimed that a United States Court sitting on its equity side could not take cognizance of a state Statute of Frauds.

> Crowley v. Northern Pacific Railroad Co., 159 U. S. 569, 582:
>
> "While the federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the statute, *with the original rights of the parties*

> *unchanged.* * * * A party going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals. Other cases to the same effect are Holland v. Challon, 110 U. S. 15; Marshall v. Holmes, 141 U. S. 569, and other cases cited."

The mode of procedure in this case was of course different in the admiralty court to what it would have been in the state court. Libelant would have no cause of action in the state court. How can he give himself a cause of action because he happens to go into another court of equal jurisdiction over his claimed contract; and how can the other party lose his defense? This is not a case of jurisdiction, but a case of rights.

If it could be held that the Statute of Frauds did not apply to libelant's services as master it certainly *did apply to his service on shore,* and *how can an entire contract be severed?* This one was not capable of severance; it was $55.00 per month for the whole service.

We submit that the language claimed to have been used by Mr. Overton, even if he had the power to hire libelant for a year, is too shadowy to create a contract for a year; that there is no proof that he had any authority to make such a contract; that the contract was void and that the court had no

jurisdiction over the subject matter of the libel, and that the judgment should be reversed.

Dated, San Francisco,
March 11, 1916.

Respectfully submitted,

H. W. Hutton,
Proctor for Appellant.